

APR 21 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUAN MORENO,

Defendant - Appellant.

No. 04-30358

D.C. No. CR-03-00080-RFC

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding

Argued and Submitted September 12, 2005
Seattle, Washington

Before: BROWNING, ALARCON, and KLEINFELD, Circuit Judges.

Juan Moreno argues that the district court violated his constitutional right to jury trial under Blakely because his sentence reflected a quantity in excess of that charged in the indictment and admitted in his guilty plea. He also argues for the

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

first time that the court erred in sentencing him for possession of methamphetamine “ice” rather than for the “mixture” to which he pled guilty.

When Moreno pleaded guilty to possession of more than 50g of methamphetamine, the penalty he faced was fixed at 5 to 40 years in prison. The district court committed no Apprendi error¹ when it considered, along with other evidence, that Moreno was in possession of “ice” and other drugs when fixing Moreno’s sentence under the Guidelines at 100 months.²

However, that same determination resulted in constitutional Booker error³ because it lead to the significant enhancement of Moreno’s sentence under mandatory sentencing guidelines. As the error was unpreserved, a limited Ameline remand is appropriate.⁴

¹ Apprendi v. New Jersey, 530 U.S. 466 (2000).

² Compare United States v. Velasco-Heredia, 319 F.3d 1080, 1085 (9th Cir. 2003) with United States v. Toliver, 351 F.3d 423, 432-33 (9th Cir. 2003).

³ United States v. Booker, 543 U.S. 220 (2005).

⁴ United States v. Ameline, 409 F.3d 1073, 1079 (9th Cir. 2005) (en banc).

He also argues that sentencing him for the greater quantity determined in the sentencing proceeding amounted to double jeopardy, because it gave the government a second chance, beyond his indictment, to prove a quantity. That is but another formulation of the argument against consideration of relevant conduct beyond that admitted in the plea to the indictment, and fails for the same reason. He was sentenced only once on his plea, for the crime of which he was convicted.

Moreno also argues that his sentence should not have been enhanced for sales with 1,000 feet of public housing,⁵ because neither he nor anyone else realized they were within a special or protected zone. The defendant need not be aware of the protected location to apply this enhancement.⁶

We grant a limited remand to allow the district court to answer the question whether it would have imposed a different sentence had it viewed the Guidelines as advisory.⁷

⁵ See 21 U.S.C. § 860(a).

⁶ United States v. Pitts, 908 F.2d 458, 461 (9th Cir. 1990).

⁷ United States v. Ameline, 409 F.3d 1073, 1079 (9th Cir. 2005) (en banc).

AFFIRMED and REMANDED.